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[Review of DOD Programs Funded With R&D Appropriations]

Number: B-220682

Date: 1986-02-21

B-220682, FEB 21, 1986

APPROPRIATIONS - ALLOCATIONS - NOT SPECIFIED IN APPROPRIATIONS ACTS DIGEST: THE DOD AUTHORIZATION ACT, 1985, PROVIDES THAT $45 MILLION AND $37.795 MILLION OF NAVY RESEARCH AND DEVELOPMENT (R&D) FUNDS "IS AVAILABLE ONLY FOR" THE RACER AND MK-92 PROGRAMS. THIS PROVISION REQUIRES THE SUMS BE MADE AVAILABLE, AND EXPENDED, FOR THE PROGRAMS IN QUESTION. HOWEVER, THE AUTHORIZATION ACT MUST BE READ IN CONCERT WITH THE DOD APPROPRIATIONS ACT, 1985, UNLESS THEY ARE CLEARLY INCONSISTENT. HERE WE FOUND NO INCONSISTENCY BETWEEN A LUMP-SUM APPROPRIATION FOR NAVY R&D AND A PROVISION IN THE AUTHORIZATION ACT WHICH SET-ASIDE SPECIFIC AMOUNTS OF THE TOTAL APPROPRIATION FOR ONE OF THE PURPOSES COVERED IN THE APPROPRIATION ACT.

THE HONORABLE LES ASPIN:

CHAIRMAN, COMMITTEE ON ARMED SERVICES

HOUSE OF REPRESENTATIVES

THIS IS IN RESPONSE TO YOUR LEGAL REQUEST OF OCTOBER 11, 1985, THAT THIS OFFICE REVIEW CERTAIN DEPARTMENT OF DEFENSE (DOD) PROGRAMS FUNDED WITH RESEARCH AND DEVELOPMENT APPROPRIATIONS. AS EXPLAINED IN DETAIL BELOW, WE CONCLUDE THAT THE DEPARTMENT OF THE NAVY HAS MISCONSTRUED THE REQUIREMENTS OF THE AUTHORIZING LEGISLATION WITH RESPECT TO TWO OF THE PROGRAMS WE REVIEWED-- THE RANKINE-CYCLE ENERGY RECOVERY SYSTEM (RACER) AND THE MARK- 92 FIRE CONTROL SYSTEM (MK-92). REGARDING A THIRD, THE DDG-51 GUIDED MISSILE DESTROYER PROGRAM (DDG-51), WE FOUND THAT THE SECRETARY OF THE NAVY'S CERTIFICATION COMPLIES IN SUBSTANCE WITH THE STATUTORY REQUIREMENT.

I.

RACER AND MK-92

THE DEPARTMENT OF DEFENSE (DOD) SOUGHT CONTINUED RESEARCH AND DEVELOPMENT FUNDING FOR A NAVY PROGRAM KNOWN AS THE SHIP PROPULSION SYSTEM (SPS) IN THE FISCAL YEAR (FY) 1985 AUTHORIZATION AND APPROPRIATION PROCESS. THE PROGRAM CONSISTS OF THE FOLLOWING THREE SUBPROGRAMS:

1. GAS TURBINE PROPULSION

2. GAS TURBINE COMPONENT IMPROVEMENT

3. RANKINE-CYCLE ENERGY RECOVERY SYSTEM (RACER)

THE DOD AUTHORIZATION ACT, 1985, AUTHORIZED A LUMP SUM OF $9,409,596,000 TO BE APPROPRIATED FOR NAVY RESEARCH, DEVELOPMENT, TEST AND EVALUATION (RDT&E). PUB.L. NO. 98-525, SEC. 201(A), 98 STAT. 2507, OCTOBER 19, 1984. HOWEVER, THE ACT PROVIDED THAT, OF THE AMOUNTS AUTHORIZED IN SECTION 201 FOR NAVY RDT&E, "$45,000,000 IS AVAILABLE ONLY FOR CONTINUED DEVELOPMENT OF THE *** RACER SYSTEM ***." PUB.L. NO. 98-525, SEC. 203(A)(1), 98 STAT. 2508.

THE DOD APPROPRIATIONS ACT, 1985, APPROPRIATED A LUMP SUM OF $9,172,622,000 FOR NAVY RDT&E, TO REMAIN AVAILABLE UNTIL SEPTEMBER 30, 1986. PUB.L. NO. 98-473, 98 STAT. 1920, OCTOBER 12, 1984. THAT ACT DID NOT SPECIFICALLY EARMARK ANY FUNDS FOR THE RACER.

BY LETTER DATED JUNE 8, 1985, THE SECRETARY OF THE NAVY ADVISED THE SENATE AND HOUSE ARMED SERVICES COMMITTEES (HASC) THAT THE NAVY PLANNED TO OBLIGATE $23.427 MILLION FOR THE RACER. /1/ IN A RESPONSE DATED JULY 9, 1985, THE CHAIRMAN OF THE HASC OBJECTED TO THE DEPARTMENT'S PLAN, OBSERVING THAT "THE ABSENCE OF STATUTORY LANGUAGE CONCERNING THE RACER SYSTEM IN THE APPROPRIATIONS ACT DOES NOT REPEAL THE PROVISIONS OF LAW SPECIFIED IN THE AUTHORIZATION ACT ***." THE CHAIRMAN'S LETTER CONCLUDED THAT, SINCE THE APPROPRIATIONS ACT CONTAINED NO MORE SPECIFIC GUIDANCE REGARDING THE RACER THAN DID THE AUTHORIZATION ACT, THE NAVY SHOULD OBLIGATE $45 MILLION FOR THE RACER.

BY LETTER DATED JANUARY 14, 1986, THE NAVY ADVISED US THAT IT DOES NOT INTEND TO OBLIGATE ANY ADDITIONAL FUNDS FOR THE RACER. IN OTHER WORDS, THE NAVY DOES NOT BELIEVE THAT $45 MILLION OF THE 1985 RDT&E APPROPRIATION IS AVAILABLE ONLY FOR THE RACER.

THE MK-92 PRESENTS ESSENTIALLY THE SAME ISSUE. THE DOD AUTHORIZATION ACT, 1985, AUTHORIZED TO BE APPROPRIATED A LUMP SUM FOR NAVY RDT&E, BUT PROVIDED THAT, OF THE AMOUNTS AUTHORIZED, $37.795 MILLION WAS AVAILABLE ONLY FOR THE MK-92. 98 STAT. 2507-08. THE CORRESPONDING APPROPRIATION ACT FOR 1985 DID NOT EARMARK ANY FUNDS FOR THE MK-92. INSTEAD, A LUMP SUM WAS APPROPRIATED FOR NAVY RDT&E. 98 STAT. 1920. THE NAVY PLANS TO OBLIGATE ONLY $14.941 MILLION FOR THE MK 92 PROGRAM.

THE ISSUE PRESENTED IS WHETHER THE EARMARK LANGUAGE ($45 MILLION ONLY FOR RACER AND $37.795 MILLION ONLY FOR THE MK-92) IN THE DOD AUTHORIZATION ACT, 1985, IS BINDING ON THE NAVY WHERE THE DOD APPROPRIATIONS ACT, 1985, CONTAINS NO SUCH RESTRICTIVE LANGUAGE AND APPROPRIATES A LUMP SUM FOR NAVY RESEARCH PROGRAMS, INCLUDING RACER AND MK-92. WE THINK IT IS.

A REVIEW OF THE DOD 1985 AUTHORIZATION AND APPROPRIATIONS ACTS REVEALS NO OBVIOUS CONFLICT BETWEEN THE TWO. IN PERTINENT PART, THE AUTHORIZATION ACT PROVIDES THAT, OF THE AMOUNTS AUTHORIZED FOR NAVY RDT&E, $45 MILLION AND $37.795 MILLION ARE AVAILABLE ONLY FOR THE RACER AND MK-92, RESPECTIVELY. THE DOD APPROPRIATIONS ACT, 1985, APPROPRIATES A LUMP SUM OF $9.173 BILLION FOR ALL NAVY RDT&E, AN AMOUNT IN EXCESS OF THAT NECESSARY TO FUND THE EARMARKS SPECIFIED IN THE AUTHORIZATION ACT.

THE DEPARTMENT OF THE NAVY MAINTAINS THAT THE LANGUAGE IN THE AUTHORIZATION ACT DOES NOT EARMARK FUNDS FOR THE RACER AND MK-92, BUT INSTEAD REPRESENTS ONLY "GUIDANCE" TO THE APPROPRIATIONS COMMITTEES AND THE NAVY:

"*** FROM A LEGAL PERSPECTIVE, WE DO NOT BELIEVE THAT THE LANGUAGE IN SECTION 203(A)(1) RESULTED IN THE EARMARKING OF $45 MILLION FOR RACER. SECTION 203(A)

PLACES LIMITATIONS ON THE USE OF THE AMOUNT AUTHORIZED IN SECTION 201. IN ORDER TO SERVE AS A LEGAL RESTRICTION ON THE NAVY'S SPENDING, HOWEVER, WE BELIEVE THAT THE LIMITING LANGUAGE MUST IN SOME WAY REFERENCE THOSE FUNDS APPROPRIATED FOR THE PROGRAMS IN QUESTION. FOR EXAMPLE, IN THE CASES CITED IN YOUR LETTER (B-214585 AND B-207343), THE AUTHORIZATION ACTS PLACED RESTRICTIONS ON 'THE AMOUNTS APPROPRIATED.' CONTRAST, THE LANGUAGE USED IN THE AUTHORIZATION ACT CONTAINS NO COMPARABLE PROVISION 'TIEING-IN' SECTION 203'S LIMITING PROVISIONS TO THOSE FUNDS APPROPRIATED TO THE NAVY. THIS IS EVEN MORE SIGNIFICANT IN VIEW OF THE FACT THAT THE AUTHORIZATION ACT WAS ENACTED SUBSEQUENT TO THE APPROPRIATION ACT, WHICH CONTAINED NO SIMILAR LIMITATION ON THE NAVY'S RDT&E APPROPRIATION. CONSEQUENTLY, SECTION 203(A)'S LIMITATIONS STAND ON THEIR OWN, AND ARE INAPPLICABLE TO AMOUNTS ACTUALLY APPROPRIATED."

SECTION 203 OF THE AUTHORIZATION ACT IN PERTINENT PART PROVIDES:

"(A) OF THE AMOUNTS AUTHORIZED IN SECTION 201 FOR THE NAVY (INCLUDING THE MARINE CORPS)--

"(1) $45,000,000 IS AVAILABLE ONLY FOR *** THE RACER ***;

"(3) $37,795,000 IS AVAILABLE ONLY FOR *** THE MARK 92 FIRE CONTROL SYSTEM ***."

IN PERTINENT PART, SECTION 201(A) PROVIDES:

"FUNDS ARE HEREBY AUTHORIZED TO BE APPROPRIATED FOR FISCAL YEAR 1985 FOR THE USE OF THE ARMED FORCES FOR RESEARCH, DEVELOPMENT, TEST, AND EVALUATION IN AMOUNTS AS FOLLOWS:

"FOR THE NAVY (INCLUDING THE MARINE CORPS), $9,409,596,000."

IN GENERAL, APPROPRIATIONS TO CARRY OUT AUTHORIZING LAWS MUST BE EXPENDED IN STRICT ACCORD WITH THE AUTHORIZATION BOTH AS TO THE AMOUNT OF FUNDS AND THE NATURE OF THE WORK. E.G., B-151157, JUNE 27, 1963. SECTIONS 201(A) AND 203(A), READ TOGETHER, LINK THE AUTHORIZATION LIMITATION TO THE CORRESPONDING APPROPRIATION. IN EFFECT, THEY PROVIDE THAT, OF THE $9.4 BILLION AUTHORIZED TO BE APPROPRIATED FOR NAVY RDT&E, $45 MILLION AND $37.795 MILLION ARE AVAILABLE ONLY FOR THE RACER AND MK 92, RESPECTIVELY. THE LANGUAGE IN SECTION 201(A) THAT "FUNDS ARE HEREBY AUTHORIZED TO BE APPROPRIATED FOR FISCAL YEAR 1985" PROVIDES A SUFFICIENT LINK TO THE APPROPRIATION. /2/

THE DEPARTMENT OF THE NAVY ARGUES THAT "THE LIMITING LANGUAGE IN THE AUTHORIZATION MUST IN SOME WAY REFERENCE THOSE FUNDS APPROPRIATED FOR THE PROGRAMS IN QUESTION." NAVY CITES NO AUTHORITY FOR THIS POSITION, NOR ARE WE AWARE OF ANY. NAVY CITES TWO CASES IN WHICH THE LANGUAGE OF THE AUTHORIZATION RESTRICTION EXPRESSLY REFERENCES THE APPROPRIATION. HOWEVER, THOSE CASES DO NOT SUPPORT THE PROPOSITION URGED BY THE NAVY, THAT SUCH REFERENCE IS LEGALLY NECESSARY.

FURTHERMORE, IN CIRCUMSTANCES INVOLVING ESSENTIALLY THE SAME STATUTORY LANGUAGE AS IN THIS CASE, WE HAVE CONCLUDED THAT THE EARMARK LANGUAGE IN THE AUTHORIZATION ACT SHOULD BE APPLIED TO THE APPROPRIATION. THE AUTHORIZATION ACT FOR THE IMMIGRATION AND NATURALIZATION SERVICE (INS) FOR 1979 PROVIDED IN PERTINENT PART:

"THERE ARE AUTHORIZED TO BE APPROPRIATED THE FOLLOWING AMOUNTS *** $320,720,000

OF WHICH $2,052,000 SHALL BE MADE AVAILABLE FOR *** CASES INVOLVING CERTAIN ALLEGED CRIMINALS."

THIS PROVISION IS IN ALL MATERIAL RESPECTS IDENTICAL TO THE NAVY RDT&E AUTHORIZATION HERE IN QUESTION.

WE CONCLUDED THAT THE PROVISIONS OF THE AUTHORIZATION ACT SHOULD BE READ IN CONCERT WITH THOSE OF THE APPROPRIATION ACT UNLESS THEY ARE CLEARLY INCONSISTENT. WE FOUND NOTHING INCONSISTENT ABOUT A LUMP-SUM APPROPRIATION FOR INS AND A PROVISION IN THE AUTHORIZATION STATUTE WHICH SET ASIDE A CERTAIN AMOUNT OF THE TOTAL APPROPRIATION FOR ONE OF THE PURPOSES COVERED IN THE APPROPRIATION ACT. WE HELD THAT THE PURPOSE AND EFFECT OF THE EARMARK IN THE AUTHORIZATION ACT WAS TO LIMIT THE USE OF $2.052 MILLION OF THE INS APPROPRIATION TO CERTAIN CASES INVOLVING ALLEGED CRIMINALS. B-193282, DECEMBER 21, 1978.

THE PRESENT RACER AND MK-92 FACTS ARE GOVERNED BY OUR DECISION IN THE INS CASE. THE STATUTORY LANGUAGE "TIEING-IN" THE AUTHORIZATION EARMARK TO THE AMOUNTS MADE AVAILABLE IN THE APPROPRIATIONS ACT WAS ESSENTIALLY THE SAME. THE LANGUAGE "THERE ARE AUTHORIZED TO BE APPROPRIATED" LINKED THE RESTRICTION IN THE AUTHORIZATION ACT WITH THE LUMP-SUM APPROPRIATION. MOREOVER, AS IN THE INS DECISION, WE DO NOT SEE ANYTHING INCONSISTENT, NOR DOES THE NAVY SUGGEST ANY INCONSISTENCY, WITH A LUMP-SUM APPROPRIATION FOR NAVY RDT&E AND A PROVISION IN THE AUTHORIZATION ACT WHICH SETS ASIDE A PORTION OF THE GENERAL NAVY RDT&E APPROPRIATIONS FOR SPECIFIC NAVY RDT&E PROGRAMS.

NAVY POINTS TO THE FACT THAT THE AUTHORIZATION ACT WAS ENACTED AFTER THE APPROPRIATION. NAVY SUGGESTS THAT THAT UNUSUAL SEQUENCE STRENGTHENS ITS ARGUMENT THAT THE APPROPRIATION IS NOT SUBJECT TO THE AUTHORIZATION RESTRICTION. OUR DECISIONS DO NOT SUPPORT THAT PROPOSITION. IN THE INS CASE DISCUSSED ABOVE, FOR EXAMPLE, THE AUTHORIZATION WAS ENACTED AFTER THE APPROPRIATION. INDEED, IT SEEMS AT LEAST EQUALLY LOGICAL TO ARGUE THAT THE CONGRESS, KNOWING THAT AN UNRESTRICTED LUMP-SUM APPROPRIATION HAD ALREADY BEEN ENACTED, MUST HAVE INTENDED, BY THEN ENACTING THE AUTHORIZATION WITH RESTRICTIONS, TO LIMIT THE USE OF THE APPROPRIATION. EVEN IF THE FUNDS WERE AVAILABLE FOR EXPENDITURE WITHOUT RESTRICTION UPON ENACTMENT OF THE APPROPRIATION, NOTWITHSTANDING 10 U.S.C. SEC. 138(A), THE LEGAL EFFECT OF THE AUTHORIZATION LANGUAGE WOULD BE TO AMEND THE IMPLIED AUTHORITY OF THE APPROPRIATION ACT BY RESTRICTING IT TO THE TERMS OF THE AUTHORIZATION ACT.

OUR DECISION IN B-214585, MARCH 22, 1985, ALSO SUPPORTS OUR CONCLUSION THAT AN EARMARK IN AN AUTHORIZATION ACT MUST BE FOLLOWED WHERE A LUMP SUM IS APPROPRIATED PURSUANT TO THE AUTHORIZATION. IN THIS CASE WE HELD THAT AN AUTHORIZATION RESTRICTION OF $16.3 MILLION FOR TWO SPECIFIC SUBGRANTEES WAS BINDING UPON THE GRANTOR AGENCY, THE NATIONAL ENDOWMENT FOR DEMOCRACY, WHERE A LUMP SUM WAS APPROPRIATED FOR THE ENDOWMENT. SEE ALSO, B-207343, AUGUST 18, 1982, FOR A SIMILAR RESULT.

WE ARE AWARE THAT SECTION 8025 OF THE DOD APPROPRIATION ACT, 1985, PERMITS THE SECRETARY OF DEFENSE, WHEN HE DETERMINES SUCH ACTION TO BE IN THE NATIONAL INTEREST, TO TRANSFER UP TO $1.2 BILLION BETWEEN APPROPRIATIONS AND SUBDIVISIONS THEREOF, PROVIDED THE TRANSFER IS FOR "HIGHER PRIORITY ITEMS, BASED ON UNFORESEEN MILITARY REQUIREMENTS" AND THE SECRETARY NOTIFIES THE CONGRESS PROMPTLY. PUB.L. NO. 98-473, 98 STAT. 1928. THE NAVY HAS NOT INVOKED SECTION 8025 HERE AND IT DOES NOT APPEAR THAT ANY OF THE FINDINGS AND ACTIONS BY THE

SECRETARY OF DEFENSE WHICH ARE NECESSARY UNDER THIS SECTION HAVE BEEN MADE.

BASED ON THE FOREGOING ANALYSIS, WE CONCLUDE THAT THE EARMARK LANGUAGE IN THE DOD AUTHORIZATION ACT, 1985, WAS BINDING ON THE DEPARTMENT OF THE NAVY AND $45 MILLION AND $37.795 MILLION ARE AVAILABLE ONLY FOR THE RACER AND MK-92. BY SEPARATE LETTER, WE ARE ADVISING THE SECRETARY OF THE NAVY OF OUR CONCLUSION.

WITHOUT KNOWING WHAT ACTION THE NAVY WILL TAKE, IT WOULD BE PREMATURE TO DISCUSS IN DETAIL THE POSSIBLE CONSEQUENCES OF THIS DECISION. HOWEVER, THE OBLIGATION OF FUNDS EARMARKED FOR THESE PROGRAMS FOR SOME OTHER PURPOSE WOULD COMPEL US TO CONSIDER WHETHER TO TAKE EXCEPTION TO THE CERTIFYING OFFICER'S ACCOUNT. SEE 31 U.S.C. SEC. 1301(A).

II.

DDG-51

YOU ALSO ASKED US TO EXAMINE THE NAVY'S COMPLIANCE WITH THE CERTIFICATION REQUIREMENTS OF SECTION 102(H) OF THE DOD AUTHORIZATION ACT, 1985. THIS REGARD, THE DEPARTMENT SOUGHT CONTINUED FUNDING FOR THE DDG-51 ARLEIGH BURKE CLASS GUIDED MISSILE DESTROYER IN FY 85. ALTHOUGH MAKING FUNDS AVAILABLE FOR THIS PROGRAM, CONGRESS HAS BEEN CONCERNED ABOUT THE COMPATIBILITY BETWEEN THE RACER SYSTEM AND THE DDG 51 CLASS SHIPS.

SECTION 203(A)(1) OF THE DOD AUTHORIZATION ACT, 1985, PROVIDES THAT "$45,000,000 IS AVAILABLE ONLY FOR CONTINUED DEVELOPMENT OF THE *** (RACER) SYSTEM TO ENSURE COMPATIBILITY OF THE RACER SYSTEM WITH ALL SHIPS OF THE DDG-51 CLASS, INCLUDING THE LEAD SHIP." IN COMMENTING ON THIS PROVISION, THE HOUSE REPORT STATED THAT "THE NAVY'S PRESENT DESIGN OF THE DDG-51 WOULD REQUIRE A SUBSTANTIAL MODIFICATION TO INCORPORATE THE RACER SYSTEM." H.R. REP. NO. 98-691, 170 (1984). ADDITIONALLY, SECTION 102(H) OF THE DOD AUTHORIZATION ACT, 1985, 98 STAT. 2501, PROVIDES THAT NONE OF THE FUNDS AUTHORIZED FOR THE DDG-51 PROGRAM FOR SHIPBUILDING AND CONVERSION ($1,173,900,000) MAY BE OBLIGATED OR EXPENDED UNTIL THE SECRETARY OF THE NAVY CERTIFIES TO THE APPROPRIATIONS AND ARMED SERVICES COMMITTEES "THAT THE LEAD SHIP IN THAT PROGRAM IS CAPABLE OF BEING EQUIPPED WITH THE RACER SYSTEM WITHOUT REARRANGEMENT OF SHIP SPACES AND EQUIPMENT OR OTHER MAJOR MODIFICATION TO THE SHIP." BY LETTER DATED NOVEMBER 28, 1984, THE SECRETARY OF THE NAVY PROVIDED A CERTIFICATION TO THE OVERSIGHT COMMITTEES. IN THAT LETTER, THE SECRETARY STATED THAT THE LEAD SHIP OF THE DDG-51 CLASS COULD BE BACKFITTED WITH THE RACER SYSTEM AND THAT THE RETROFIT WOULD NOT "REQUIRE MODIFICATION OF THE LENGTH OR WIDTH OF THE SHIP OR *** INVOLVE RELOCATION OF EXISTING WATERTIGHT BOUNDARIES." IN REPLY, THEN CHAIRMAN PRICE OF THE HASC INDICATED THAT IN HIS OPINION, THE CERTIFICATION WAS INADEQUATE, STRESSING THAT THE STATUTE ANTICIPATES THAT THE LEAD SHIP ACCOMMODATE THE RACER SYSTEM "WITHOUT REARRANGEMENT OF SHIP SPACES AND EQUIPMENT OR OTHER MAJOR MODIFICATIONS TO THE SHIP."

ON DECEMBER 21, 1984, IN RESPONSE TO CHAIRMAN PRICE'S LETTER, THE SECRETARY CERTIFIED THAT "THE LEAD SHIP, DDG-51, WILL BE CAPABLE OF BEING EQUIPPED WITH RACER SYSTEM WITHOUT REARRANGEMENT OF SHIP SPACES AND EQUIPMENT OR OTHER MAJOR MODIFICATION TO THE SHIP." FURTHER, THE SECRETARY ADVISED THAT ALTHOUGH THE SOLICITATION FOR THE DDG-51 WAS ISSUED ON AUGUST 31, 1984, THE NAVY PLANS TO ISSUE AN ENGINEERING CHANGE PROPOSAL TO MODIFY THE SHIP'S DESIGN TO MEET THE AUTHORIZATION ACT'S REQUIREMENTS WHEN THE SHIPBUILDING CONTRACT IS AWARDED.

IN RESPONSE TO OUR INQUIRY CONCERNING THE DECEMBER 21, 1984, LETTER, THE NAVY STATES THAT IT "TRACKED THE STATUTORY CERTIFICATION LANGUAGE ***," ALBEIT WHILE INDICATING FUTURE RATHER THAN PRESENT CAPABILITY FOR EQUIPPING THE LEAD SHIP WITH THE RACER SYSTEM. HOWEVER, BY ALSO STATING ITS INTENTION TO ISSUE AN ENGINEERING CHANGE PROPOSAL (ECP) TO CHANGE THE LEAD SHIP'S DESIGN TO MEET THE REQUIREMENTS OF THE DOD AUTHORIZATION ACT, 1985, THE NAVY BELIEVES IT HAS FULLY ADDRESSED THE CONGRESSIONAL CONCERN THAT MOTIVATED THE CERTIFICATION REQUIREMENT EVEN IF THE CERTIFICATION TECHNICALLY DEVIATES FROM THE STATUTORY LANGUAGE.

THE LEGAL QUESTION IS WHETHER THE SECRETARY'S DECEMBER 21, 1984, LETTER STATING THAT THE LEAD SHIP OF THE DDG-51 CLASS "WILL BE CAPABLE" OF BEING EQUIPPED WITH RACER SATISFIES THE REQUIREMENT OF SEC. 102(H) OF THE DOD AUTHORIZATION ACT, 1985, THAT THE LEAD SHIP "IS CAPABLE" OF BEING EQUIPPED WITH RACER. IN OUR OPINION, THE NAVY'S DECEMBER 21, 1984, LETTER COMPLIES WITH THE CERTIFICATION REQUIREMENT OF SECTION 102(H).

A REVIEW OF THE LEGISLATIVE HISTORY INDICATES THAT THE CONGRESSIONAL PURPOSE IN REQUIRING THE CERTIFICATION WAS TO ASSURE "THAT THE LEAD SHIP OF THE DDG-51 PROGRAM CAN BE READILY BACKFITTED WITH RACER SYSTEM," AND THAT THE FIRST SHIPS IN THE CLASS BE "DESIGNED TO ACCOMMODATE AN INEXPENSIVE RETROFIT OF RACER WITHOUT EXTENSIVE MODIFICATIONS." SEE H.R. REP. NO. 98-691, 87-88 (1984); AND S.REP. NO. 98-500, 74-75, (1984). THE CONGRESSIONAL CONCERN THAT THE LEAD SHIP BE CAPABLE OF ACCOMMODATING THE RACER WITHOUT EXTENSIVE DESIGN CHANGES TO AN OPERATIONAL VESSEL APPARENTLY STEMS FROM THE FACT THAT THE RACER AND DDG-51 CLASS SHIP ARE BEING DEVELOPED SIMULTANEOUSLY AND THE LEAD SHIP OF THE CLASS MAY BE ON LINE BEFORE DEVELOPMENT OF THE RACER IS COMPLETE.

THE AUTHORIZATION ACT WAS ENACTED INTO LAW ON OCTOBER 19, 1984, BUT THE SOLICITATION FOR THE DDG-51 HAD BEEN ISSUED ON AUGUST 31, 1984. APPARENTLY THE SOLICITATION ISSUED AT THAT TIME DID NOT ALLOW FOR INCORPORATION OF THE RACER WITHOUT MAJOR MODIFICATION TO THE SHIP BECAUSE THE CERTIFICATION LETTER OF DECEMBER 21 INDICATES THE NAVY'S PLANS TO ISSUE AN ECP TO THE SHIPBUILDING CONTRACT TO PERMIT THIS. BECAUSE THE SOLICITATION HAD BEEN ISSUED WHEN THE CONGRESS IMPOSED THE CERTIFICATION REQUIREMENT, IT APPEARS REASONABLE THAT THE NAVY SHOULD NOW INDICATE THAT THE SHIP "WILL BE CAPABLE" OF BEING EQUIPPED WITH THE RACER. ADDITIONALLY, THE NAVY'S STATEMENT THAT AN ECP WOULD BE ISSUED TO AMEND THE SHIPBUILDING CONTRACT ONCE A CONTRACTOR WAS SELECTED IS CONCRETE EVIDENCE THAT THE NAVY NOT ONLY UNDERSTANDS THE REQUIREMENT BUT IS TAKING ACTION TO COMPLY WITH THE MANDATE. IN THIS REGARD, WE UNDERSTAND THAT BATH IRON WORKS WAS AWARDED THE SHIPBUILDING CONTRACT IN APRIL 1985, AND IN SEPTEMBER 1985 THE NAVY IN FACT ISSUED AN ECP REQUESTING BATH TO CHANGE THE LEAD SHIP'S DESIGN TO COMPLY WITH THE CERTIFICATION REQUIREMENTS. BATH HAS RESPONDED TO THE ECP AND THE NAVY EXPECTS TO ISSUE A CONTRACT MODIFICATION IN JUNE 1986.

BASED ON THE FOREGOING WE BELIEVE THE NAVY'S DECEMBER 21, 1984, LETTER COMPLIES WITH THE CERTIFICATION REQUIREMENT IN SEC. 102(H) OF THE DOD AUTHORIZATION ACT, 1985.

UNLESS YOU PUBLICLY ANNOUNCE THE CONTENTS OF THIS DECISION EARLIER, WE WILL WITHHOLD FURTHER DISTRIBUTION FOR 7 DAYS, AFTER WHICH COPIES WILL BE MADE AVAILABLE TO OTHER INTERESTED CONGRESSIONAL COMMITTEES AND MEMBERS; AND OTHER INTERESTED PARTIES.

/1/ AS OF SEPTEMBER 5, 1985, THE NAVY ADVISES US THAT $22.098 MILLION HAS BEEN OBLIGATED FOR THE RACER.

/2/ THE PROVISIONS OF 10 U.S.C. SEC. 138(A) ALSO UNDERMINE THE NAVY'S POSITION. THIS SECTION REQUIRES THAT THE CONGRESS AUTHORIZE ALL ANNUAL RDT&E APPROPRIATIONS FOR DOD. THE PURPOSE OF THIS PROVISION WAS TO INCREASE THE OVERSIGHT ROLE OF THE AUTHORIZING COMMITTEES. H.R. REP. NO. 729, 86TH CONG., 91-92 (1959); S.REP. NO. 296, 86TH CONG., 306 (1959). THE EXISTENCE OF THIS REQUIREMENT FURTHER SUPPORTS OUR CONCLUSION THAT RESTRICTIONS IN THE AUTHORIZATION ACT PERTAINING TO NAVY RDT&E SHOULD BE GIVEN EFFECT IN CONSTRUING THE NAVY LUMP-SUM APPROPRIATION FOR RDT&E.